

## **The Swan Falls Agreement and the Hydropower right at Milner Dam**

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***“I am a firm believer in people. If given the truth they can be depended upon to meet any crisis. The great point is to bring them the real facts.”***

### ***Abraham Lincoln***

I read the Agenda I received for today's meeting with some amusement, but probably with more dismay. It says: *Swan Falls Agreement and Licensure of Milner Dam* - Ron Carlson, representing the Idaho Ground Water Appropriator's, Inc.

While I have done consulting work for a number of clients having interest in both surface water and ground water rights, I think it is important to understand that my message today would be exactly the same irrespective of any past or current clients I may represent. For over 30 years I conscientiously attempted to represent, and to the best of my ability, protect the collective interest of the people of this state. While occasionally some have not liked my message and disagreed with it, what I have to say today has not changed in three decades.

While in graduate school I applied for and ultimately was hired to fill a hydrologist's position with the Idaho Department of Water Administration. My first job was to determine the interconnection of groundwater and surface water and the potential interference a well might have on Whiskey Creek Springs which is located near Grace Idaho.

At that time Robert R. Lee was the Director of the Idaho Water Resource Board who was working on the development of a State Water Plan. The Water Resource Board was young and in the early 1970's the mission of the board was understood to be to develop a State Water Plan that would demonstrate to the rest of the world that there was no water in the state of Idaho that could be appropriated and diverted for use in other states. In the beginning the perspective brought to the Board by its director projected a future water plan for the State that revolved around new irrigation development, new storage projects and allocations for future DCMI uses. The developing Water Plan was predicated on Article 15 §3 of the Idaho Constitution which mandated that the State allow the beneficial use of the waters of the state and forbids the denial of that opportunity so long as there is unappropriated water that could be used beneficially. The question the Board had to struggle with was the quantification of the amount of water available for appropriation. The state was divided into hydrologic units or basins and as it turned out there was a lot of water available for appropriation above King Hill. This conclusion was predicated on the belief that the complete subordination of hydropower rights was a settled matter at the time Idaho Power prevailed over public power advocates and obtained the right to construct the Hells Canyon complex.

However, Bob Lee's understanding of the mandate for a State Water Plan was significantly different from the general public view which ultimately resulted in his being replaced by Steve Allred who took less of a "develop it all" perspective. However, the tension between the absolute right to appropriate contained in the Constitution and the public's desire for protected stream sections quickly became apparent. In part, the resolution

was for the Idaho Water Resource Board to appropriate water to be held by the state for state defined beneficial uses. These beneficial uses took the form of minimum stream flows. The 1976 the original Water Plan was released. This plan established minimum flows on the Snake, at the Murphy Gage south of Boise, at 3300 cfs and a minimum flow at Milner of “0”. The zero flow at Milner was a unique “appropriation” by the state but the intent was clear. It was to be the policy of the state that development of water on the eastern Snake Plain would continue and there would be water available for appropriation until there was a clear indication that those established minimum flows had been reached. There cannot be any dispute that the establishment of these minimums was predicated upon the subordination of hydropower rights to upstream development. The raising of minimum flows in the settlement of the Swan Falls dispute further confirmed the state’s position even though HB 574 and its alternatives and successors failed to pass the Idaho State by narrow margins. There was a clear consensus in southern Idaho that Idaho Power was not entitled to call for surface water arising above Milner dam. While the disputes were heated the zero flow at Milner was not changed. IPCO could never call for water from above Milner. The minimum flow at the Murphy Gage was raised from 3300 cfs to 3900 cfs during the summer and 5600 cfs after the irrigation diversions between Milner and Murphy were shut off on November 1. The Swan Falls agreement in the simplest terms was reflected in the additional appropriation by the IWRB of water discharging from the thousand springs that arise between Milner and King Hill. Idaho Power’s subordinated water rights were now the minimum flow water rights held by the state through the IWRB. It is my opinion the only logical conclusion comes in the recognition that the state acquired IPCO’s water rights through the Swan

Falls Agreement and holds them in trust as the 20,000 acres per year of new groundwater development proceeded under the State's trust obligations. The mechanisms for meeting the 3900 cfs summer minimum were never well developed although the state had expressed intentions to seek appropriations to allow the IWRB to acquire Ririe or even the powerhead in Palisades to provide assurance that the capability of insuring the Swan Falls minimum flow existed.

In my discussion of the original water planning activities and the appropriation of water by the state for minimum flows I quickly jumped from 1976 to a 1985. In the sequence of events it is important to go back and specifically address the year that set the course we are on today. That year was 1977. This is a pivotal year in the history of the upper Snake River and the Eastern Snake River Plain, if not the State of Idaho.

Ten of the important events that occurred in 1977 are included in the following list:

1. Drought conditions; 1977 remains the single driest year of record.
2. Because of the water shortages it provided the perfect year to rebuild American Falls Dam.
3. IPCO who had been granted the falling water contracts associated with American Falls Storage was permitted to install hydro-electric generators in the new American Falls dam.
4. IPCO filed suit against junior upstream water users to protect their water rights.
5. IPCO agreed to rebuild Milner Dam for the Twin Falls and North Side Canal Companies.

6. Twin Falls Canal Co. applied for a permit to appropriate 12,000 cfs for power generation at Milner.
7. The USGS backed out of its 58 year commitment to provide watermaster services in Water District 1.
8. Art Larson, the USGS district engineer announced his retirement and I was selected by the Committee of Nine to replace him as Watermaster. I was the first state employee to ever serve as Snake River Watermaster.
9. A computerized accounting program was developed for distributing natural flow and storage within Water District 1.
10. Drought emergency funds through the Bureau of Reclamation were made available for measuring and automating surface diversions in Water District 1.

I will not attempt to address each of these but I do want to comment further on the Water District 1 accounting and the application for a hydropower right at Milner.

When the water right accounting computer code for the Water District 1 water distribution and accounting program was written it started with the understanding that any water, other than storage, that passed Milner was unappropriated water. This is what allows second fill on the reservoirs and the distribution of available natural flow after the fact. The consequences of anything but full subordination of hydropower would have significant impacts on every water user and space holder above Milner. Unlike the hypothetical impacts generated

by the ESPAM, the impacts associated with allowing water to be called below Milner are very real.

When the manager of Twin Falls Canal Company brought to my office the application for a permit to appropriate 12,000 cfs at Milner it was in the context of a diversion dam at Milner that was failing and had to be repaired. This was also in the backdrop of a lawsuit against TFCC and a subsequent system evaluation by CH2MHill that found deficiencies in the Twin Falls system totaling \$65 million, excluding the work needed on Milner Dam. Under any other circumstances I believe the application for the 12,000 cfs right would have been rejected because Idaho Code §42-203 required that: . . . *the proposed use is such that it will reduce the quantity of water under existing water rights, or that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or the applicant has not sufficient financial resources with which to complete the work involved therein, the Director of the Department of Water Administration may reject such application and refuse issuance of permit therefore, or may partially approve and grant permit for a less quantity of water than applied for, or may grant permit upon conditions.* This section of course sets forth the process for appropriation under the mandatory permitting process and the language appears to say upstream appropriation shall not be limited by hydropower development.

***. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought***

*to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.*

The interpretation of wording of the statute is likely open for debate but my interpretation does reflect the position of the Department at that time. The uses of water for power production would not limit water development. In any case, the water supply at Milner clearly was not sufficient for the purpose intended and it was doubtful that Twin Falls Canal Co. had the financial resources to complete the proposed project.

I suspect that TFCC filed the application in Idaho Falls rather than in Twin Falls because the TFCC manager believed that I would receive the application more sympathetically than the regional manager in the Southern Region. I in fact was sympathetic and presented the case to the director that even with all of its defects this application should be approved because Milner Dam had to be rebuilt. Steve Allred and Ken Dunn agreed with me. Their position was; hydropower rights are fully subordinated therefore the provisions in the statutes can be met because no other water users are at risk. If Twin Falls and Idaho Power wanted to take the risk on building a power facility where there was no dependable water supply they should have that opportunity. There was also subtle pressure on the director because the dam at Milner was failing and someone had to rebuild it. If TFCC and NSCC could get IPCO to front the money to rebuild the Milner dam, that was certainly in the interest of the state. Since hydropower rights are subordinated to upstream development, and in this case, there was the additional protection given by the establishment by the IWRB of the

zero minimum flow, no other water rights or future development were are at risk. The fact that the flow at Milner for many decades has been zero for most of the year every year is simply a condition the applicant has to live with.

The Idaho Code provides the opportunity for anyone who feels they will be adversely affected by a new appropriation to file a protest with the Department. Water users who inquired about the 12,000 cfs application were told by the department, “don’t worry, Milner has to be rebuilt if those using water from the Milner pool are to continue being able to divert there water entitlements. Full subordination of hydropower guarantees that you will never be adversely affected by this hydropower use.” All potential protestants were thus discouraged from filing protests by IDWR employees. “Don’t waste your time, you are protected by hydropower subordination,” we would say.

The Swan Falls issues and agreement are simply an extension of the Milner permit and license issues. The only significant differences include the broader IPCO hydropower issues involving the discharge for the ESPA through the Thousand Springs and the fact that as a practical matter the Board’s minimum at the Murphy gage created a trust responsibility between the State and IPCO.

It is interesting to me that given the presentations made by the IWRB and representations of Tom Nelson and others in the mid 1980’s that the meaning or the intent of the Swan Falls agreement would continue to be debated. The agreement was the negotiated equivalent of HB

574 which took all of IPCO's horsepower to keep from becoming law. The Swan Falls agreement should always be viewed in the context of the legislation that almost passed.